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No. 101

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM VINCENT VITARELLI, PETITIONER

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
ALAN S. ROSENTHAL,
SETH H. DUBIN,
Attorneys,
Department of Justice, Washington 25, D. C.

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OPINIONS BELOW

The order of the United States District Court for the District of Columbia (R. 52) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit and the dissenting opinion of Judge Fahy (R. 53–60; Pet. App. 41–48) are reported at 253 F. 2d 338.

JURISDICTION

The judgment of the Court of Appeals was entered on February 13, 1958 (R. 61; Pet. App. 40). On May 5, 1958, by order of the Chief Justice, the time

for filing a petition for a writ of certiorari was extended until June 13, 1958. The petition for a writ of certiorari was filed on June 12, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a federal government employee without tenure in a nonsensitive position who was discharged pursuant to procedures provided by law for sensitive positions only and subsequently, without reinstatement, again discharged, this time without characterization as a "security risk," has any present right to a declaratory judgment or to reinstatement.

STATUTES AND REGULATIONS INVOLVED

Sections 1 and 3 of the Act of August 26, 1950 (64 Stat. 476–477, 5 U. S. C. 22–1, 22–3) are set forth in the Appendix, *infra*, pp. 11–13. Executive Order 10450, issued April 27, 1953, is set forth at Pet. App., pp. 26–27. Department of the Interior Order 2738, dated November 9, 1953, is set forth in pertinent part at Pet. App., pp. 28–33.

STATEMENT

On September 10, 1952, the petitioner, a nonveteran, was appointed by the Department of Interior, Office of Territories, as an Education and Training Specialist on the Pacific Island of Koror (R. 40–41). Since this position was within Schedule A of the Civil Service regulations and therefore excepted from classified civil service, it did not confer civil service status on the petitioner (R. 41). Rather,

the petitioner signed an agreement to serve for twenty-four months, "or such part thereof as [his] services may be needed" (R. 42).

On April 2, 1954, the petitioner was suspended and served with written charges by the Secretary of the Interior pursuant to the Act of August 26, 1950, 64 Stat. 476, 5 U. S. C. 22–1, Executive Order No. 10450, 18 F. R. 2489, and Department of the Interior Order No. 2738[1] (R. 12–15). The charges, in general, were that the petitioner was "either a member of, affiliated with, or in sympathetic association with the Communist Party, and members of the Communist Party" (R. 12) and that he might be "subjected to coercion, influence, or pressure which [might cause him] to act contrary to the best interests of national security" (R. 15).

The petitioner answered the charges with forty-four supporting affidavits (R. 24, 35), but was informed by the Secretary on June 11, 1954, that his answer and supporting documents did not constitute sufficient grounds to reinstate him (R. 24, 35). The petitioner was thereafter given a hearing before a security hearing board at which he was represented by counsel (R. 24, 35, 45). At that hearing, four witnesses testified in petitioner's behalf (R. 25, 35).

On September 2, 1954, the Secretary accepted the recommendation of the hearing board "that the employment of William Vincent Vitarelli is not clearly consistent with the interests of national security" and

[1] The suspension long antedated this Court's decision in *Cole v. Young*, 351 U. S. 536, and the Secretary cited these sources despite the fact that petitioner's position was nonsensitive.

ordered that the petitioner's employment be terminated as of September 10, 1954 (R. 44–46). Although a rehearing was granted, and additional testimony taken before the personnel officer of the Interior Department Office of the Territories, the Secretary again refused reinstatement on May 11, 1956 (R. 27, 36).

On June 11, 1956, this Court decided, in *Cole* v. *Young*, 351 U. S. 536, that the Act of August 26, 1950, and Executive Order 10450 were inapplicable to a non-sensitive position such as the petitioner's. On the following day, the petitioner again demanded reinstatement (R. 27, 37).

On July 10, 1956, the petitioner instituted this action against the respondents Secretary of the Interior and the Civil Service Commissioners seeking (1) a declaratory judgment that his discharge was illegal; and (2) a mandatory injunction directing reinstatement, back pay and the expunging of all records pertaining to petitioner's discharge (R. 21–32). Shortly thereafter, the Civil Service Commission voluntarily expunged from its records all indication that the petitioner was dismissed for security reasons (R. 48–49). In place of the prior termination notice, the Department of the Interior substituted a new notice, bearing the same date as the original, which did not suggest the reason for the petitioner's dismissal (R. 47–48).

The district court, on cross motions for summary judgment, dismissed the complaint (R. 52). The Court of Appeals affirmed, Fahy, J., dissenting (R. 53–60; Pet. App. 41–48). It held that the security risk discharge procedures provided by the Act of

1950, Executive Order No. 10450, and Departmental Order 2738 were prescribed for the discharge of employees in sensitive positions who normally would be entitled to even greater procedural protection under other statutes such as the Lloyd-LaFollette or Veterans' Preference Acts (Pet. App. 43–44). However, since the petitioner was not a veteran nor otherwise protected in the tenure of his employment, he was subject to dismissal without cause and therefore not entitled to the benefit of the Act of 1950 and the Executive Orders implementing it (Pet. App. 44). At most, he was entitled not to be discharged for "flagrantly arbitrary" or unconstitutional grounds and dismissal as a security risk was neither "flagrantly arbitrary" not unconstitutional *per se* (Pet. App. 44–45).[2] Moreover, the procedure utilized by the Secretary, including formal written charges, an opportunity for the petitioner to answer, and a hearing at which the petitioner was represented by counsel and presented witnesses, clearly afforded the petitioner due process (Pet. App. 45). Therefore, although the Secretary erred in citing the Act of 1950 and implementing executive orders as the authority for the discharge proceedings, the discharge was nevertheless valid (Pet. App. 46). Moreover, one of the grounds for dismissal—that the petitioner was "not reliable or trustworthy" and had "deliberately misrepresented * * * material facts"—furnished an adequate

[2] As this Court observed in *Cole* v. *Young*, 351 U. S. 536, the question was "not whether an employee *can* be dismissed on such grounds but only the extent to which the summary procedures authorized by the 1950 Act are available in such a case," id. at 544.

basis for dismissal regardless of the questions raised concerning the security discharge procedures (Pet. App. 46–47).

As a further ground for affirmance, the court noted that the respondents had already afforded the petitioner the full relief to which he would be entitled even if the 1954 discharge were invalid (Pet. App. 47). In this connection, it pointed to the facts that the Civil Service Commission voluntarily has expunged all records of findings that the petitioner was a security risk and that the Department of the Interior has substituted a second termination notice which omitted all reference to discharge for security reasons (Pet. App. 47).

ARGUMENT

1. The Court of Appeals correctly held that there is no effective relief to which the petitioner is entitled, regardless of the validity of the 1954 dismissal. It is clear that he is not now entitled to reinstatement. As he concedes (Pet. 12), in view of his status as a non-veteran in an excepted position, he was subject at all times to summary discharge without cause. In these circumstances, the second termination notice, which made no reference to the Act of August 26, 1950, Executive Order No. 10450 or Departmental Order 2738, was plainly valid.[3]

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[3] In *Peters* v. *Hobby*, 349 U. S. 331, this Court noted that reinstatement was not available to petitioner because his term of office had expired, *id.* at 349. Similarly, the petitioner here cannot be reinstated because he has been dismissed properly subsequent to the allegedly illegal discharge.

The petitioner's argument that the second dismissal was ineffective because he was no longer an employee when the

There is no other relief which could be granted to petitioner. The records of the Civil Service Commission have been expunged of all references to the petitioner as a security risk and now indicate simply that he was summarily discharged. Cf. *Peters* v. *Hobby*, 349 U. S. 331. And the district court lacked jurisdiction to entertain the petitioner's claim for back pay. *Bruner* v. *United States*, 343 U. S. 112; 28 U. S. C. 1346 (d) (2), 1491.

The only possible relief remaining would be a declaratory judgment that the procedure under the 1950 Act was improperly applied to the petitioner. Since this is conceded and, as stated above, the records have been corrected, there is no necessity for granting review in order to accord such relief.

2. This Court has recently observed that the Act of 1950 "is not the only, nor even the primary, source of authority to dismiss Government employees. The general personnel laws—the Lloyd-LaFollette and Veterans' Preference Acts—authorize dismissals for 'such cause as will promote the efficiency of the service.' * * *." *Cole* v. *Young*, *supra*, at 543. However, Congress, in the Act of 1950, limited the procedural rights of employees covered by these Acts in cases where national security was the basis for suspension and subsequent dismissal. The purpose of the Act clearly was not to expand the administrative rights

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otherwise valid termination notice was issued, is self-defeating. Either the first discharge was proper and the petitioner was legally discharged, or the 1954 discharge was invalid and the petitioner was, for purposes of legal termination of his services, still subject to dismissal.

of employees who were not covered by the Lloyd-LaFollette and Veterans' Preference Acts, but rather to limit the rights of employees who were protected by those Acts.[4]

Absent the Act of 1950, the petitioner, as a non-veteran Schedule A employee, was not entitled to be served with charges nor to secure a hearing prior to discharge. Therefore, the Act of 1950 and Executive Order No. 10450 cannot be the bases for requiring that he be afforded the procedures they prescribe. In spite of this, the petitioner contends that he was not afforded his full rights under the Interior Department Order 2738 implementing Executive Order No. 10450. As is pointed out below, the procedures set out by the regulations were in fact followed. However, since petitioner was a non-veteran Schedule A employee, he had no right to those procedures.[5]

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[4] "The purpose of the bill is to *increase* the authority of the heads of Government departments engaged in sensitive activities to summarily suspend employees considered to be bad security risks, and to terminate their services if subsequent investigation develops facts which support such action." (Emphasis added.) S. Rept. No. 2158, 81st Cong., 2d Sess., p. 2.

[5] Although as a non-veteran Schedule A employee petitioner was subject to summary discharge, we do not contend that the Secretary of the Interior properly could have refused to expunge from the records the characterization of petitioner as a "security risk" nor that petitioner properly could have been prospectively barred from competitive Civil Service without some type of administrative proceeding. Therefore, although petitioner correctly notes that the petitioner in *Peters* v. *Hobby*, 349 U. S. 331, was a non-veteran Schedule A employee like petitioner, the critical facts that Dr. Peters' records indicated

3. Moreover, even though petitioner was a non-veteran Schedule A employee, and therefore not entitled to the procedures prescribed by Department Order 2738, the Secretary did, in fact, comply with those procedures in dismissing him.

The Secretary's charges furnished to petitioner were by no means simply conclusory assertions. Rather, they were specific charges of concealed intimate friendships with two named Communist sympathizers, registration in 1945 with an allegedly communist controlled political party, and subscription to Communist publications. On the basis of these specific acts, the Secretary concluded that the petitioner's "behavior, activities and associations tend to show that [he is] not reliable or trustworthy" and that there was "reason to believe that [petitioner] deliberately misrepresented, falsified or omitted material facts in connection with [his] behavior, activities and associations, and [that petitioner] may be subjected to coercion, influence, or pressure which may cause [him] to act contrary to the best interests of national

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that he had been discharged for security reasons and that the Loyalty Review Board had imposed a three-year bar to his employment in competitive Civil Service distinguish the *Peters* case from the present petition.

Service v. *Dulles*, 354 U. S. 363, is also inapposite since the Secretary's power to summarily discharge Mr. Service under the McCarran Rider was expressly limited by the Departmental Regulations prescribing procedures for security risk discharges, *id.* at 373–376. Similarly, *Cole* v. *Young*, 351 U. S. 536, is inapplicable since Mr. Cole was a veteran's preference eligible, *id.* at 539.

security." Especially in view of the direction in the Departmental Order that the statement of charges "shall be as specific and detailed as security considerations, including the need for protection of confidential sources of information, permit", these charges were sufficiently precise to permit refutation by the petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
ALAN S. ROSENTHAL,
SETH H. DUBIN,
Attorneys.

JULY 1958.

APPENDIX

The Act of August 26, 1950 (64 Stat. 476–477, 5 U. S. C. 22–1, 22–3) provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, notwithstanding the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555), as amended (5 U. S. C. 652), or the provisions of any other law, the Secretary of State; Secretary of Commerce; Attorney General; the Secretary of Defense; the Secretary of the Army; the Secretary of the Navy; the Secretary of the Air Force; the Secretary of the Treasury; Atomic Energy Commission; the Chairman, National Security Resources Board; or the Director, National Advisory Committee for Aeronautics, may, in his absolute discretion and when deemed necessary in the interest of national security, suspend, without pay, any civilian officer or employee of the Department of State (including the Foreign Service of the United States), Department of Commerce, Department of Justice, Department of Defense, Department of the Army, Department of the Navy, Department of the Air Force, Coast Guard, Atomic Energy Commission, National Security Resources Board, or National Advisory Committee for Aeronautics, respectively, or of their several field services: *Provided*, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated by

the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final: *Provided further*, That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head; *Provided further*, That any person whose employment is so suspended or terminated under the authority of this Act may, in the discretion of the agency head concerned, be reinstated or restored to duty, and if so reinstated or restored shall be allowed compensation for all or any part of the period of such suspension or termination in an amount not to exceed the difference between the amount such

person would normally have earned during the period of such suspension or termination, at the rate he was receiving on the date of suspension or termination, as appropriate, and the interim net earnings of such person: *Provided further,* That the termination of employment herein provided shall not affect the right of such officer or employee to seek or accept employment in any other department or agency of the Government: *Provided further,* That the head of any department or agency considering the appointment of any person whose employment has been terminated under the provisions of this Act may make such appointment only after consultation with the Civil Service Commission, which agency shall have the authority at the written request of either the head of such agency or such employee to determine whether any such person is eligible for employment by any other agency or department of the Government.

* * * * *

SEC. 3. The provisions of this Act shall apply to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interests of national security. If any departments or agencies are included by the President, he shall so report to the Committees on the Armed Services of the Congress.

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U. S. GOVERNMENT PRINTING OFFICE 1950